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TAGS: PARM, CCD

SUBJECT:CCD - ENMOD NEGOTIATIONS: GUIDANCE ON ILLUSTRATIVE LIST

REFS: (A) GENEVA 5965; (B) GENEVA 6477

1. FOLLOWING IS GUIDANCE ON VARIOUS QUESTIONS INVOLVED IN ENMOD CONVENTION'S ILLUSTRATIVE LIST OF PHENOMENA, INCLUDING DUTCH QUESTION ON LEGAL EFFECT OF NON-ACCEPTANCE OF AN AMENDMENT TO ILLUSTRATIVE LIST; QUESTION OF DELETING LIST; AND QUESTION OF ADDITIONAL EXAMPLE OF HYDROLOGICAL CYCLE UPSET.

2. DUTCH QUESTION. AS SET OUT IN THE DRAFT, THE LIST OF PHENOMENA (EFFECTS) IS AN ILLUSTRATIVE COMPILATION OF PHENOMENA THAT COULD BE CAUSED BY MEANS OF A DELIBERATE MANIPULATION OF NATURAL PROCESSES -- I.E., BY ENMOD TECHNIQUES AS DEFINED IN ARTICLE II. AS SUCH, IT DOES NOT HAVE A DIRECT BEARING ON THE BASIC OBLIGATIONS OF PARTIES, WHICH ARE ESTABLISHED BY ARTICLE I AND BY THE DEFINITION OF ENMOD TECHNIQUES IN ARTICLE II. THUS, AN AMENDMENT ADDING A NEW PHENOMENON TO THE LIST WOULD NOT AFFECT A PARTY'S BASIC OBLIGATIONS WHETHER OR NOT IT ACCEPTED THE AMENDMENT; EVERY PARTY IS BOUND NOT TO ENGAGE

IN HOSTILE USE OF ENMOD TECHNIQUES HAVING WIDESPREAD, LONG-LASTING, OR SEVERE EFFECTS REGARDLESS OF THE PRESENCE OR ABSENCE OF THE RESULTING PHENOMENON ON THE LIST.

3. A STATE PARTY'S ACCEPTANCE OF A NEW PHENOMENON ON THE LIST WOULD, IN EFFECT, REPRESENT ITS JUDGMENT THAT THE PHENOMENON IN QUESTION COULD BE PRODUCED BY MEANS OF ENMOD TECHNIQUES. NON-ACCEPTANCE OF THE PHENOMENON WOULD NOT NECESSARILY REPRESENT AN ASSERTION THAT IT COULD IN NO WAY BE PRODUCED BY SUCH TECHNIQUES, BUT COULD REFLECT THE VIEW THAT SPECIFYING THE PARTICULAR PHENOMENON WOULD BE MISLEADING IN THAT IT WOULD NOT LIKELY BE THE RESULT OF AN ENMOD TECHNIQUE. IN ANY EVENT, REJECTION OF A NEW PHENOMENON WOULD NOT AFFECT A STATE'S OBLIGATION NOT TO USE ENMOD TECHNIQUES AS DEFINED IN ARTICLE II TO LIMITED OFFICIAL USE

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PRODUCE THE PHENOMENON, PROVIDED SUCH USE FELL WITHIN THE SCOPE OF PROHIBITION SET FORTH IN ARTICLE I.

4. IF THERE WERE A GENERAL UNDERSTANDING OR AGREEMENT THAT ALL THE PHENOMENA INCLUDED IN THE LIST ARE NOT ONLY ONES THAT COULD BE PRODUCED BY USE OF ENMOD TECHNIQUES BUT ARE IN ADDITION ONES CONSIDERED TO HAVE WIDESPREAD, LONG-LASTING, OR SEVERE EFFECTS, THEN ACCEPTANCE OF AN

AMENDMENT ADDING A NEW PHENOMENON COULD HAVE A BEARING ON A STATE'S OBLIGATIONS BY CONFIRMING ITS VIEW THAT THE HOSTILE USE OF ANY ENMOD TECHNIQUE TO PRODUCE THAT PHENOMENON WOULD INVARIABLY CONSTITUTE A VIOLATION OF THE CONVENTION. BUT EVEN IN THIS CASE, NON-ACCEPTANCE OF THE NEW PHENOMENON WOULD NOT RELIEVE A STATE FROM ITS OBLIGATION NOT TO USE ENMOD TECHNIQUES, AS DEFINED IN ARTICLE II AND WITHIN THE SCOPE OF PROHIBITION IN ARTICLE I, TO PRODUCE THE PHENOMENON. AS CCD MEMBERS ARE AWARE, WE HAVE STATED OUR VIEW THAT ALL THE PHENOMENA PRESENTLY ON THE LIST HAVE THIS CHARACTERISTIC -- I.E., THEY WOULD RESULT, OR COULD REASONABLY BE EXPECTED TO RESULT, IN WIDESPREAD, LONG-LASTING, OR SEVERE DESTRUCTION, DAMAGE, OR INJURY. WE BELIEVE IT IS DESIRABLE TO AVOID INCLUSION OF EXAMPLES THAT DO NOT HAVE THIS CHARACTERISTIC,

AND THIS WOULD AFFECT OUR ATTITUDE TOWARD INCLUSION OF

OTHER EXAMPLES. HOWEVER, WE RECOGNIZE THAT THIS CHARACTERISTIC OF THE LIST IS NOT DETERMINED BY THE CONVENTION'S LANGUAGE AND IS NOT ESSENTIAL TO THE LEGAL EFFECT OF THE CONVENTION.

5. DELETING THE LIST. ALTHOUGH, AS EXPLAINED ABOVE, WE DO NOT FORESEE SIGNIFICANT LEGAL COMPLICATIONS ARISING FROM AMENDMENTS TO THE ILLUSTRATIVE LIST THAT ARE NOT

UNIVERSALLY ACCEPTED, WE RECOGNIZE THAT UNCERTAINTIES MAY ARISE AND ARE THEREFORE WILLING TO DELETE THE LIST IF OTHERS REMAIN CONCERNED THAT IT COULD BECOME A SOURCE OF CONTROVERSY ONCE THE CONVENTION ENTERS INTO FORCE. DEL MAY ACCORDINGLY FIRST EXPLORE THIS POSSIBILITY WITH SOVIETS, BUT WITHOUT TAKING STRONG ADVOCACY STAND IF THEY LIMITED OFFICIAL USE

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CONTINUE TO WANT LIST RETAINED. IF SOVIETS AGREE TO DELETION OF LIST, DEL SHOULD ALSO DISCUSS POSSIBILITY OF AGREED STATEMENT -- EITHER BY US AND USSR OR BY COMMITTEE AS A WHOLE -- SETTING OUT THE ILLUSTRATIVE PHENOMENA PRESENTLY ON THE LIST (INCLUDING, IF POSSIBLE, THE ADDITIONAL PHENOMENA DEL HAS BEEN AUTHORIZED TO ACCEPT) IN NEGOTIATING RECORD. WE WOULD PREFER, IF POSSIBLE, THAT SUCH A STATEMENT ALSO REFLECT OUR INTERPRETATION THAT ALL THE PHENOMENA OF THE LIST WOULD RESULT, OR COULD REASONABLY BE EXPECTED TO RESULT, IN WIDESPREAD, LONG-LASTING, OR SEVERE EFFECTS AND THUS WOULD CONSTITUTE A VIOLATION OF THE CONVENTION IF PRODUCED BY ENMOD TECHNIQUES WITHIN THE MEANING OF ARTICLES I AND II.

6. IF, ON OTHER HAND, LIST IS TO BE RETAINED IN CONVENTION OR AN ANNEX, 'E DO NOT SEE ANY ADVANTAGE IN MINIMIZING ITS FORMALITY AND WOULD WANT IT TO BE RECOGNIZED AS AN INTEGRAL PART OF THE CONVENTION. IF LIST IS PLACED IN AN ANNEX, IT SHOULD REMAIN LINKED WITH ARTICLE II BY LANGUAGE SUCH AS "... SO AS TO CAUSE SUCH PHENOMENA AS THOSE CONTAINED IN ANNEX (BLANK)." LIST SHOULD NOT BE MADE SUBJECT TO EASIER AMENDMENT PROCEDURE THAN ANY OTHER PART OF CONVENTION.

7. ADDITIONS TO LIST. WE WOULD NOT NECESSARILY OBJECT TO INCLUSION OF "UPSET IN THE HYDROLOGICAL CYCLE (OR BALANCE) OF A REGION" AS AN EXAMPLE IF THERE IS BROAD INTEREST IN ADDING IT AND A GENERAL UNDERSTANDING OF ITS MEANING. HOWEVER, BEFORE MAKING FINAL DETERMINATION OF ITS ACCEPTABILITY, WE WOULD WANT CLAFIFICATION FROM ITS PROPONENTS OF GENERAL DEFINITION OF TERM AND SPECIFIC TYPES OF PHENOMENA ENCOMPASSED BY IT. TN ANY EVENT, WE DO NOT CONSIDER THE EXAMPLE AS SYNONYMOUS WITH "FLOODS AND DROUGHT" (WHICH MIGHT NOT DISRUPT THE LONG-TERM HYDROLOGICAL BALANCE), AND IF IT WERE INCLUDED IT SHOULD APPEAR IN ADDITION TO RATHER THAN INSTEAD OF "FLOODS AND DROUGHT." ROBINSON

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